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No. 90-1150

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

DONALD J. WILLY,

Petitioner,

versus

THE COASTAL CORPORATION, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR PETITIONER DONALD J. WILLY

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REPLY BRIEF FOR PETITIONER

COASTAL'S ARGUMENT

Coastal and the other respondents ("Coastal") advance three distinct defenses of the district court's sanctions order and the Fifth Circuit's summary affirmance of it.

1. Coastal asserts in Part B of its brief (pp. 13-26) that federal trial courts (and, by implication, the courts of appeals and this Court) are inherently empowered to impose

attorney's fees as a sanction for bad-faith litigation, without congressional authorization or subject-matter jurisdiction, because such awards are collateral to, independent of, and unrestrained by the limitations over cases and controversies prescribed by § 2 of Article III. This transcendent authority supposedly arises from the congressional investiture of the federal courts with a "judicial power of the United States" under Article III § 1 that Coastal claims is different from and superior to the "judicial power" limited by § 2, and from an asserted competence to determine subject-matter jurisdiction, whether correctly or mistakenly, that "is sufficient to support any order entered by a federal court." Brief of Respondents at p. 25.

2. Alternatively, Coastal argues that the Rules Enabling Act, 28 U.S.C. § 2072, and F.R.Civ.P. 11, when read together, provide a source of authority, properly delegated by Congress and implemented by this Court, for awarding attorney's fees to defendants wrongly invoking the federal judicial power (Part A, pp. 10-12; Part C, pp. 27-38). Coastal believes Rule 11 by itself confers jurisdictional competence on a federal district court to award attorney's fees, even if its consideration and disposition of every other aspect of the controversy is foreclosed by Article III.

3. Finally, Coastal offers several reasons why it thinks the result reached by the lower courts is fair and wise as a matter of national judicial policy, and why Willy's position, if adopted by the Court, "would constitute a grave impediment to the administration of justice in the federal courts" (Part D, pp. 38-40).

Coastal is wrong in maintaining that the Constitution distinguishes between a federal court's adjudications of the merits of cases and controversies, which are subject to the constraints of Article III § 2, and its determinations of so-

called "collateral matters," which Coastal says are not so restrained.[1] That untenable distinction is crucial to Coastal's mistaken reliance on *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. ___, 110 S.Ct. 2447, 110 L.Ed.2d 359 (1990), which the Fifth Circuit cited, and to its efforts to distinguish *United States Catholic Conference v. Abortion Rights Mobilization, Inc.*, 487 U.S. 72 (1988), the decision that actually controls this case.

Nothing in the text, structure, or history of Article III, or in any of the Court's previous opinions, lends support to Coastal's position. It is capably presented, but it was fashioned *ad hoc*, after the grant of certiorari, to rationalize lower court decisions that never explicitly formulated, articulated, or developed the argument.[2]

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[1] The word "collateral," or some variant of it, appears 22 times in Coastal's brief. The remarkable idea that there is a *constitutional* distinction between cases and controversies under Article III § 2, and "collateral matters" that are not subject to § 2's limitations, is the central feature of Coastal's position.

[2] The Fifth Circuit's first *Willy* opinion miscited two cases, in which plaintiffs sought attorney's fees against defendants wrongly removing actions to the federal court, for the entirely different proposition that defendants wrongly removing a case can recover attorney's fees against the plaintiff. *Vatican Shrimp Co., Inc. v. Solis*, 820 F.2d 674 (5 Cir. 1987), *cert. denied* 484 U.S. 953 (1987); *News-Texan, Inc. v. City of Garland*, 814 F.2d 216 (5 Cir. 1987). Coastal understandably does not rely upon, discuss, or even cite these two cases in its brief before this Court.

The Fifth Circuit's second *Willy* opinion, insisting that the two cases implicitly supported the attorney's fees award, 915 F.2d at 967 n. 6, and that "the imposition of Rule 11 sanctions . . . constitutes [the exercise of] an inherent power" over a "collateral issue" under *Cooter & Gell v. Hartmarx Corp*, 496 U.S. ___, 110 S.Ct. 2447, 110 L.Ed.2d 359 (1990), found no significance in the fact that the district court in *Cooter & Gell* had Article III subject-matter jurisdiction when the sanctionable misconduct occurred, while the district court here did not.

ARGUMENT IN REPLY

1. Article III § 2 of the Constitution confines the judicial power of the United States to specified cases and controversies and does not permit a federal court to award attorney's fees, as a "collateral matter," to defendants who wrongly invoke its subject-matter jurisdiction.

After reading Coastal's brief, a person unfamiliar with the Constitution of the United States, its history, and the decisions of this Court might suppose that lower federal courts are empowered by Article III to decide two separate and distinct kinds of cases and controversies.[3] One group, involving decisions on the merits that require adjudication of the substantive rights and obligations of the litigants, concededly is limited by the subject-matter jurisdictional constraints of Article III § 2 and by the power of Congress. A second, separate category, involving "collateral matters," seemingly is immune from any constitutional or congressional limitation whatever.

The Supreme Court's decisions in reality recognize no general exemption from the constraints of Article III § 2 for "collateral matters."[4] On the contrary, the Court repeatedly and consistently has regarded all adjudicatory powers of all lower federal courts in all cases (with the possible exception

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[3] "The term 'controversies,' if distinguishable at all from 'cases,' is so in that it is less comprehensive than the latter, and includes only suits of a civil nature." *In re Pacific Ry. Comm'n*, 32 F. 241, 255 (N.D. Cal. 1887) (opinion of Justice Field).

[4] The characterization of an order, proceeding, or other matter as "collateral" or "ancillary" can have significant consequences in other contexts. *E.g.*, *Cohen v. Beneficial Ind. Loan Corp.*, 337 U.S. 541 (1949); Brief for Petitioner at p. 19 n. 16 (pendent or ancillary jurisdiction). However, if a federal court has no subject-matter jurisdiction over an Article III case or controversy, such concepts confer no constitutional power to act.

of the unique, self-defensive power of criminal contempt) to be limited by § 2, and limitable by the overriding authority of Congress, the representatives of the people who created those courts.

Predictably, Coastal's principal reliance is on *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. ___, 110 S.Ct. 2447, 110 L.Ed.2d 359 (1990), the decision mistakenly thought by the Fifth Circuit to be controlling. Coastal asserts that Willy's position is "flatly inconsistent" with *Cooter & Gell*'s central holding that "a district court has power to order Rule 11 sanctions following voluntary dismissal of a case." Brief of Respondents at p. 33 n. 22. In reality, there is no inconsistency at all, flat or otherwise.

When the sanctionable misconduct occurred in *Cooter & Gell*, the district court possessed constitutional power over the controversy under 28 U.S.C. §§ 1331 and 1337, invoked by the plaintiff's factually deficient antitrust complaint, which was also the filing eventually deemed sanctionable. Far from being irrelevant or coincidental, the district court's subject-matter jurisdiction was a crucial and indispensable component of this Court's ultimate holding in that case:

> The view more consistent with Rule 11's language and purposes, and the one supported by the weight of Circuit authority, is that district courts may enforce Rule 11 even after the plaintiff has filed a notice of dismissal under Rule 41(a)(1). . . *The district court's [subject-matter] jurisdiction, invoked by the filing of the underlying complaint, supports consideration of both the merits of the action and the motion for Rule 11 sanctions arising from that filing*. As the "violation of Rule 11

> is complete when the paper is filed," . . . a voluntary dismissal does not expunge the Rule 11 violation. In order to comply with Rule 11's requirement that a court "shall" impose sanctions "[i]f a pleading, motion, or other paper is signed in violation of this rule," a court must have the authority to consider whether there has been a violation of the signing requirement regardless of the dismissal of the underlying action. 496 U.S. at ___, 110 S.Ct. at 2455, 110 L.Ed.2d at 375 (1990) (emphasis added; citation omitted).

The Court in *Cooter & Gell* neither decided nor implied that the district court had power to impose a Rule 11 sanction *apart from* subject-matter jurisdiction. Rather, the Court held squarely that the power to sanction existed precisely *because* the district court possessed subject-matter jurisdiction over the controversy when the punishable misbehavior occurred, even though the case eventually was dismissed before the sanction was assessed:

> Like the imposition of costs, attorney's fees, and contempt sanctions, the imposition of a Rule 11 sanction is not a judgment on the merits of an action. Rather, it requires the determination of a collateral issue: whether the attorney has abused the judicial process, and, if so, what sanction would be appropriate. Such a determination may be made after the principal suit has been terminated. 496 U.S. at ___, 110 S.Ct. at 2456, 110 L.Ed.2d at 376.

Coastal is mistaken in believing that *Cooter & Gell* recognizes a federal court's supposed constitutional authority over "collateral matters," apart from Article III subject-matter jurisdiction. Although the Court held that "a federal court may consider collateral issues after an action is no longer pending," 496 U.S. at ___, 110 S.Ct. at 2455, 110 L.Ed.2d at 375, it did not confirm a federal court's competence to consider such issues before its constitutional power has been established. The Court was not there presented with, and did not decide, any claim that the district court's sanction award violated Article III. The district court's subject-matter jurisdiction, and its constitutional authority to act, were not even in issue.

The same principle underlies the inherent sanctioning power recognized in *Chambers v. NASCO, Inc.*, 501 U.S. ___, 111 S.Ct. 2123, 115 L.Ed.2d 27 (1991). In that case the question was "whether the District Court, *sitting in diversity*, properly invoked its inherent power in assessing as a sanction for a party's bad-faith conduct attorney's fees and related expenses paid by the party's opponent to its attorneys." 501 U.S. at ___, 111 S.Ct. at 2128, 115 L.Ed.2d at 39 (emphasis added). The Court held that the district court was inherently empowered by the Constitution to deal effectively with the outrageous, irresponsible misbehavior of G. Russell Chambers and his lawyers, even that which antedated the filing of the case, because Congress had conferred diversity of citizenship jurisdiction under 28 U.S.C. § 1332, which the district court properly exercised and which the sanctionable misconduct significantly disrupted. The Court recognized no supposed power over "collateral matters," existing independently and apart from established Article III limitations or a statutory grant of subject-matter jurisdiction.

In contrast, the district court in this case never possessed Article III subject-matter jurisdiction over the controversy at all, at any stage of the proceedings. When Willy's supposedly sanctionable misbehavior occurred, the district court was not exercising subject-matter jurisdiction over an Article III case or controversy. Since the court already had decided incorrectly the jurisdictional issue, it was not exercising jurisdiction to determine its jurisdiction. In short, rather than doing anything that Article III or Congress empowered it to do, the district court was violating the Constitution of the United States, by mistakenly entertaining and resolving an exclusively state-law dispute that it never had any constitutional power to decide at any stage of the proceedings.[5]

Coastal's creative, imaginative, but unprecedented effort to draw a constitutional distinction between § 2 cases and controversies on the one hand and "collateral matters" on the other is ultimately insupportable. This Court's decisions establish that fact very clearly.

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[5] Coastal treats the district court's mistaken assumption of subject-matter jurisdiction as a sort of trivial procedural lapse, explainable by "the complexity of these issues," and excusable because everybody except Willy and Young allegedly acted in "good faith." Brief of Respondents at pp. 2, 39.

This Court historically has regarded the wrongful assertion of federal judicial power over state cases, even in the utmost good faith, as a matter of the most profound seriousness and consequence. See, *e.g.*, *Younger v. Harris*, 401 U.S. 37 (1971) and companion cases; *Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975). The scope of the Article III judicial power does not depend on subjective states of mind, or on characterizations of proceedings as "collateral." If the district court here had correctly decided it had no subject-matter jurisdiction over the controversy, it would have had no constitutional power to award attorney's fees. It can have no greater power merely because of its own "good faith" jurisdictional mistake.

Costs and Attorney's Fees. In 1875 Congress empowered federal courts to award costs in cases mistakenly removed from a state court and thereafter remanded for lack of subject-matter jurisdiction. In 1911 it provided for such costs in original actions dismissed for lack of subject-matter jurisdiction.[6] Until then, it had "long been the settled practice in the federal tribunals not to grant costs in a cause which is discontinued or dismissed on the ground that the court has no jurisdiction of the subject-matter. This has generally been placed on the ground of want of power in the court." *Cooper v. New Haven Steam-Boat Co.*, 18 F. 588 (S.D.N.Y. 1883); *Phoenix-Buttes Gold Mining Co. v. Winstead*, 226 F. 863, 864 (N.D. Cal. 1914) ("where the action is dismissed for want of jurisdiction, the court loses power to award costs").[7]

Coastal addresses only one of the Supreme Court decisions on which Willy relies, *The Mayor v. Cooper*, 6 Wall. 247 (1868), and then only casually, in footnote 22 at page 33, near the end of its brief. That footnote advances three reasons why Coastal believes costs can be awarded as a "collateral" sanction by a federal court, even in the absence of a statute or Article III subject-matter jurisdiction, and even in the face of the Court's unequivocal holding that, "[i]f there were no jurisdiction, there was no power to do anything but to strike the case from the docket." 6 Wall. at 250.

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[6] Act of March 3, 1875, ch. 137, § 5, 18 Stat. 470, 472; Act of March 3, 1911, ch. 231, § 37, 36 Stat. 1087, 1098.

[7] In addition to the cases cited in Willy's principal brief at p. 20 n. 18, see also *Hornthall v. The Collector*, 9 Wall. 560, 566-67 (1870); *Strader v. Graham*, 18 How. 602 (1856); *Bradstreet v. Potter*, 16 Pet. 317, 318 (1842); *M'Iver v. Wattles*, 9 Wheat. 650 (1824); *Inglee v. Coolidge*, 2 Wheat. 363, 368 (1817); *Montalet v. Murray*, 4 Cranch 46, 47 (1807).

First, Coastal maintains in its footnote 22 that the holding in *The Mayor v. Cooper* is *dictum* that "cannot be read . . . to refer to a lack of constitutional power to punish litigation misconduct," because "such a reading is flatly inconsistent" with *Cooter & Gell*. As Willy has shown, however, there is no inconsistency at all. *Cooter & Gell* did not address any Article III issue, much less the question presented by this case. Moreover, a limitation on the federal judicial power recognized by Chief Justice Marshall and Justice Story as early as 1817 (*Inglee v. Coolidge*, 2 Wheat. 363), and by Justice Brandeis as late as 1925 (*Smyth v. Asphalt Belt Ry. Co.*, 267 U.S. 326), and by at least nine intervening Supreme Court decisions, cannot be dismissed persuasively as mere *dictum*.

Secondly, Coastal's footnote asserts that the power denied by these decisions over the "collateral" issue of costs was not of constitutional dimensions, because Congress subsequently authorized the recovery of costs by statute. Coastal misses the point. Congress' plenary authority over lower federal courts, consigned to it by Article III § 1 and the necessary and proper clause, enables it to provide by statute for recovery of costs against those wrongly invoking federal subject-matter jurisdiction. Absent such jurisdiction, or interference with a jurisdictional determination, the federal courts have no express, implied, or inherent constitutional authority to awartd costs themselves. The Federal Rules provide no help, since a court's power under them "cannot be more extensive than its jurisdiction." *United States Catholic Conference v. Abortion Rights Mobilization, Inc.*, 487 U.S. 72, 76 (1988); F.R.Civ.P. 82.

Finally, Coastal in its footnote thinks *The Mayor v. Cooper* involves only "a general power to shift costs based on the outcome of a case," whereas this case involves a

"more fundamental power to shift fees as a sanction for misconduct." *More fundamental?* Where does it say that in the Constitution, or in any previous decision of this Court?[8] In each instance in which the Court previously has sustained the inherent power of federal courts to award costs or attorney's fees as a sanction for bad-faith civil litigation, the Constitution and Congress already had empowered the federal court to act in the case.[9] This Court has never

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[8] The Starr Committee Report says that there are more than 150 federal fee-shifting statutes that authorize the award of attorney's fees to prevailing parties. REPORT FROM THE PRESIDENT'S COUNCIL ON COMPETITIVENESS: AGENDA FOR CIVIL JUSTICE REFORM IN AMERICA (August 1991) at p. 25. If a fee-shifting attorney's fees award specifically authorized by Congress cannot be sustained in the absence of subject-matter jurisdiction, punitive awards of attorney's fees as a sanction cannot be any more sustainable in the absence of such jurisdiction, particularly if only federal judges and not Congress have authorized them. Nothing in the language or history of Article III, or in this Court's decisions, justifies a previously unrecognized constitutional exemption for punitive awards of costs and fees to those wrongly invoking federal jurisdiction.

[9] *E.g.*, *Chambers v. NASCO, Inc.*, 501 U.S. ___ (1991) (diversity of citizenship jurisdiction); *Roadway Express, Inc. v. Piper*, 447 U.S. 752 (1980) (civil rights jurisdiction); *Hall v. Cole*, 412 U.S. 1 (1973) (jurisdiction under Labor-Management Reporting and Disclosure Act); *Vaughan v. Atkinson*, 369 U.S. 527 (1962) (admiralty jurisdiction); *Toledo Scale Co. v. Computing Scale Co.*, 261 U.S. 399 (1923) (appellate jurisdiction). *Compare Link v. Wabash R. Co.*, 370 U.S. 626 (1962) (inherent power to dismiss diversity action for want of prosecution) *with Davis v. Cluet, Peabody & Co.*, 667 F.2d 1371, 1372 (11 Cir. 1982) (no inherent power to dismiss action on merits, in absence of subject-matter jurisdiction, as a sanction for plaintiffs' "repeated refusal to follow federal and local procedure rules and court orders," since such dismissal would "work a wrongful extension of federal jurisdiction and give district courts power the Congress has denied them," citing *American Fire & Cas. Co. v. Finn*, 341 U.S. 6, 18 (1951)).

sustained the exercise of such a sanctioning power in a case in which the district court eventually was determined to lack the constitutional power to decide the merits of a case or controversy beyond Article III. Coastal cites no Supreme Court decision for that proposition, because there is none.[10]

Civil contempt sanctions. Effectively conceding that "collateral" civil contempt sanctions cannot be sustained in the absence of subject-matter jurisdiction,[11] Coastal retreats to the position that the attorney's fees awarded against Willy, ostensibly under both Rule 11 and an asserted inherent power, are "much more like a citation for criminal contempt than for civil contempt." Brief of Respondents at p. 33.

That is not what this Court said in *Hutto v. Finney*, 437 U.S. 678, 691 and n. 17 (1978), cited and quoted with approval in *Chambers v. NASCO, Inc.*, 501 U.S. at ___, 111 S.Ct. at 2137, 115 L.Ed.2d at 51:

> [T]he award of attorney's fees for bad faith serve[s] the same purpose as a remedial fine imposed for civil contempt [because it] vindicate[s] the District Court's authority over a recalcitrant litigant. . . That the award ha[s] a compensatory effect does not in any event distinguish it from a fine for civil contempt, which also compensates a private party for the consequences of a contemnor's disobedience.

Attorney's fees awarded as a sanction under Rule 11 or a federal court's inherent sanctioning power are not equivalent to criminal contempt penalties. If they were, they would implicate the same constitutional safeguards afforded those accused of contumacious misconduct, including the presumption of innocence, the standard of proof of guilt beyond a reasonable doubt, and the procedural protections afforded by F.R.Cr.P. 42.[12] Private parties interested in the litigation could not benefit from imposition of criminal sanctions, and their attorneys could not prosecute an action to recover them.[13] Indeed, in that event, Coastal's capable counsel could not even appear before this Court to argue that the sanctions were properly imposed.[14]

Donald Willy is no criminal, but Coastal still cannot bring itself to admit the equivalence of civil contempt sanctions and the attorney's fees awarded against him. To do so effectively would concede defeat, since in that event this case is controlled squarely by *United States Catholic Conference v. Abortion Rights Mobilization, Inc.*, 487 U.S.

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[10] In fact, the Court has said that attorney's fees and costs awarded as a sanction under a federal court's inherent power are to benefit those prevailing on the merits of the litigation. *E.g., F. D. Rich Co., Inc. v. United States ex rel. Industrial Lumber Co., Inc.*, 417 U.S. 116, 129 (1974) ("[w]e have long recognized that attorneys' fees may be awarded to a *successful* party when his opponent has acted in bad faith . . .") (emphasis added); *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 258 (1975) ("a court may assess attorneys' fees . . . when the *losing* party" has acted in bad faith) (emphasis added). Here the parties recovering attorney's fees did not win the underlying federal litigation. They lost.

[11] *United States v. United Mine Workers*, 330 U.S. 258, 294-95 (1947); *Cliett v. Hammonds*, 305 F.2d 565, 570 (5 Cir. 1962).

[12] *Michaelson v. United States ex rel. Chicago, St. Paul, Minneapolis & Omaha Ry. Co.*, 266 U.S. 42, 66 (1924).

[13] *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787 (1987).

[14] *United States v. Providence Journal Co.*, 485 U.S. 693 (1988).

72 (1988). Thirty-five pages into its 41-page brief, Coastal makes a last-ditch effort to avoid such a concession by maintaining that the Court's opinion in *Catholic Conference*, joined by seven present members of the Court, "plainly did not mean" what it said: that "the exercise of judicial power under the [Federal] Rules always is void unless exercised in connection with a case over which the court has subject matter jurisdiction or in which it is determining jurisdiction." Brief of Respondents at p. 35.

The Court *plainly did not mean* that? Willy and his counsel believe the Supreme Court of the United States meant precisely what it said with respect to a constitutional issue as fundamental as the scope of the federal judicial power under Article III. Particularly is this so when eight members of the Court joined one opinion, unaccompanied by a single concurrence, that so clearly, simply, and eloquently articulated the important principle at stake here:

> The challenge in this case goes to the subject-matter jurisdiction of the [district] court *and hence its [constitutional] power to issue the order*. The distinction between subject-matter jurisdiction and waivable defenses is not a mere nicety of legal metaphysics. It rests instead on the central principle of a free society that courts have finite bounds of authority, some of constitutional original, which exist to protect citizens from the very wrong asserted here, the excessive use of judicial power. The courts, no less than the political branches of the government, must respect the limits of their authority. 487 U.S. at 77 (emphasis added).

Suggesting that the Court in *Catholic Conference* carelessly chose its words, and therefore "plainly" did not really mean what it said, is exceedingly implausible.

The district court's lack of subject-matter jurisdiction would have foreclosed its imposition of civil contempt sanctions in this case. *Catholic Conference* precludes its functionally equivalent imposition of attorney's fees, under a supposed inherent power to sanction bad-faith litigation.

Criminal contempt sanctions. The inherent power to impose criminal contempt sanctions is "necessary to the exercise of all others" conferred on a federal court under Article III by a congressional grant of subject-matter jurisdiction. *United States v. Hudson*, 7 Cranch 32, 34 (1812). Federal courts possess inherent criminal contempt power "by their very creation" under Article III § 1, when "called into existence and vested [by Congress] with jurisdiction over any subject."[15] That power arises from an explicit grant of subject-matter jurisdiction, or from an implicit, coordinate power to determine jurisdiction.[16]

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[15] *Michaelson v. United States ex rel. Chicago, St. Paul, Minneapolis & Omaha Ry. Co.*, 266 U.S. 42, 65-66 (1924); *Bessette v. W. B. Conkey Co.*, 194 U.S. 324, 327 (1904); *Ex parte Robinson*, 19 Wall. 505 (1874); *cf. Anderson v. Dunn*, 6 Wheat. 204 (1821) (inherent contempt power of Congress).

[16] See, *e.g.*, *United States v. United Mine Workers*, 330 U.S. 258, 293 (1947) ("an order issued by a [federal] court with *jurisdiction over the subject matter* and person must be obeyed by the parties until it is reversed by orderly and proper proceedings") (emphasis added); *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 450 (1911) (federal criminal contempt power serves "to vindicate the jurisdiction and authority of courts"); *cf. Walker v. City of Birmingham*, 388 U.S. 307, 315 (1967) (state court imposing criminal contempt sanctions for violation of injunction "[w]ithout question [had] jurisdiction over the petitioners and over the subject matter of the controversy").

An indispensable ingredient of the federal judicial power to decide cases and controversies is the capability to determine whether the power exists in a given set of circumstances. A federal court "necessarily ha[s] jurisdiction to decide whether the case [is] properly before it," *United States v. Shipp*, 203 U.S. 563, 573 (1906), and if jurisdiction is upheld, "the decision unreversed binds the parties as a thing adjudged."[17] While making jurisdictional determinations, the court has "the inherent and legitimate authority . . . to issue process and other binding orders . . . as necessary for the court to determine and rule upon its own jurisdiction, including jurisdiction over the subject matter," *United States Catholic Conference*, 487 U.S. at 79, and to punish violations of those orders by criminal contempt sanctions, regardless of whether its determination of subject-matter jurisdiction eventually is affirmed.

That principle is not at issue here. As in *Catholic Conference*, the district court's sanctions order cannot "be sustained as . . . in aid of the court's jurisdiction over the subject matter," since it related only to "the merits of the litigation," and the district court had "twice [here, three times] ruled that it had subject-matter jurisdiction of the case." 487 U.S. at 79-80. *Catholic Conference* and *Mine Workers* hold that such an order is "void" absent subject-matter jurisdiction and must be reversed "in its entirety."

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[17] *Carter v. United States*, 135 F.2d 858, 861 (5 Cir. 1943), cited in *United States v. United Mine Workers*, 330 U.S. 258, 292 n. 57 (1947).

Coastal cites and discusses *Stoll v. Gottlieb*, 305 U.S. 165 (1938) for the proposition that "jurisdiction to determine jurisdiction is sufficient to support *any* order entered by a federal court" (Brief of Respondents at p. 25) (emphasis added). If that were true, *Catholic Conference* was wrongly decided, an inference Coastal carefully refuses to draw.

2. The Rules Enabling Act and Rule 11 do not provide an independent, constitutionally permissible source of authority for a federal court to award attorney's fees, as a "collateral matter," to defendants who wrongly invoke its subject-matter jurisdiction.

Coastal's alternative argument asserts that Congress has authorized the Court's adoption of Rule 11, and that Rule 11 is applicable by virtue of F.R.Civ.P. 1 to "all suits of a civil nature" in the district courts and "civil actions removed to the United States district courts from the state courts," and therefore "governs procedure after removal," even if the district court lacks subject-matter jurisdiction over the controversy. From this perspective a rule of procedure provides a source of authority for the court to adjudicate entitlement to attorney's fees, even if it is constitutionally powerless to decide any other issue in the case.

After developing this argument, Coastal finally acknowledges at page 36 of its brief that the Federal Rules, including Rule 11, "do not extend or limit the jurisdiction of the United States district courts." F.R.Civ.P. 82. Coastal then reasons that federal jurisdiction has not been "extended" here because the "application of Rule 11 does not adjudicate *any* substantive question presented in the complaint or answer, but instead addresses the entirely independent and *collateral* issue of the proper judicial response to a party's litigation misconduct." Brief of Respondents at pp. 36-37 (first emphasis in original; second emphasis added).

Where is any of this found in the Constitution, or in any previous decision of this Court? Reduced to its essentials, Coastal's alternative contention is that federal courts can adjudicate legal and factual disputes otherwise beyond their Article III subject-matter jurisdiction, and that Congress can

confer the power to do so, as long as they involve "collateral issues," rather than "substantive questions." If "collateral issues" are above and beyond the constitutional limitations prescribed by Article III § 2, why did *Catholic Conference* find the question of whether the district court has subject-matter jurisdiction over the controversy to be determinative of its constitutional power over a "collateral issue": the issuance of a subpoena to a non-party? "Federal Rule of Civil Procedure 45 grants a district court the power to issue subpoenas as to witnesses and documents, but the subpoena power of a court cannot be more extensive than its jurisdiction." 487 U.S. at 76. Rule 11 is no different.

In *Sibbach v. Wilson & Co., Inc.*, 312 U.S. 1, 10 (1941), the Court understandably thought it was self-evident that a federal court's authority to prescribe procedural rules cannot "extend or restrict the jurisdiction conferred by a statute." In this case there was no jurisdiction, because there was no statute. There was no statute, because no constitutional provision authorized one. There is simply no comprehensible way in which the Federal Rules can be deemed to confer on a federal court a power to adjudicate any legal or factual issue, when the Constitution and Congress have not otherwise provided such authority.

Acceptance of Coastal's position effectively would mean that Congress and this Court intended to authorize and prescribe rules of practice and procedure for unconstitutional litigation in the federal courts.[18] There has been and can be no plausible explanation or support for that view.

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[18] "Congress may not expand the jurisdiction of the federal courts beyond the bounds established by the Constitution." *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 491 (1983), citing *Hodgson v. Bowerbank*, 5 Cranch 303 (1809) and *Kline v. Burke Construction Co.*, 260 U.S. 226, 234 (1922).

3. Constitutional powers that federal courts do not have cannot be created by arguments that they ought to have them.

Hoping that what the federal judiciary has done in this case can survive constitutional challenge, Coastal's brief in its final section advances reasons why the Court should not in any event exercise its inherent supervisory power to foreclose the award of attorney's fees.

Donald Willy is not a supplicant, begging for "an unwarranted reprieve for . . . abuse [of] the judicial process." Brief of Respondents at p. 40. He is an officer of this Court, admitted to its bar on motion of a former Solicitor General. His constitutional argument provides a principled basis for decision. The inflated rhetoric and offended sensibilities of those who for years have mistakenly burdened the federal judicial system with this case, in violation of the Constitution of the United States, do not.[19]

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[19] From Coastal's perspective, Rule 11 has been applied fairly and even-handedly. A near-impecunious litigant, dragged involuntarily into a federal court, has been ordered to pay $19,307.00 to an $8 billion corporate defendant and others who wrongly removed his state-law case almost six years ago. That mistaken removal, the resulting disruption and delay of a state court proceeding, and the attendant financial consequences all are excused by the defendants' good faith. The district court's erroneous decisions, on the merits and on the jurisdictional question, also are excusable because of the court's good faith and the "complexity of these issues." Brief of Respondents at p. 39.

If the district court had correctly decided this case, Article III would have compelled it to be remanded immediately. Since the court decided it incorrectly, Coastal argues, sound judicial policy demands that the company recover its attorney's fees, because any contrary result "would allow brazen and irresponsible attorneys and litigants to escape unpunished [and] deprive the district courts of an essential tool for curbing abuses in cases on their dockets." Brief of Respondents at p. 40.

If foreclosing the federal judiciary's ability to award attorney's fees as a sanction in cases beyond the judicial power conferred by Article III "would constitute a grave impediment to the administration of justice in the federal courts," Brief of Respondents at p. 39, that problem cannot be solved by making up new constitutional principles, responsive only to the immediate needs of particular cases, rather than to the Constitution's more enduring values. "These immediate interests exercise a kind of hydraulic pressure which makes what previously was clear seem doubtful, and before which even well settled principles of law will bend." *Northern Securities Co. v. United States*, 193 U.S. 197, 400-401 (1904) (dissenting opinion of Justice Holmes). "It is precisely the predictability of these pressures that counsels a resolute loyalty to constitutional safeguards." *Almeida-Sanchez v. United States*, 413 U.S. 266, 273 (1973) (opinion of Justice Stewart).

CONCLUSION

The district court's sanction order violated Article III of the Constitution. That order, and the judgment of the United States Court of Appeals for the Fifth Circuit mistakenly affirming it, are unconstitutional and should be reversed.

Respectfully submitted,

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